89-249

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ELAINE KENNA,
DEFENDANT-APPELLANT,

v.

STATE OF NEW JERSEY,
PLAINTIFF-RESPONDENT.

ON APPEAL FROM
THE SUPERIOR COURT OF
NEW JERSEY APPELLATE DIVISION
JURISDICTIONAL STATEMENT

Elaine Kenna
33-06 92nd Street
Jackson Heights, NY 11372
(718) 458-9406

JURISDICTIONAL STATEMENT

A. QUESTIONS PRESENTED BY THE APPEAL

1. Where no evidence of any kind is offered upon trial to prove a cha ge of simple assault which forms the basis of a complaint, shall a conviction survive or be subject to reversal as being in conflict with defendant's rights under the Fourteenth Amendment to the Constitution of the United States of America?

Appellant was charged with attempt to cause bodily injury to PO Douglas Brown by punching him in the chest, in violation of N.J.S. 2c:12-1(a) (1). There was no mention of any assault upon Police Officer Brown by anyone at the trial. The findings of the trial court judge (Appendix A-7) was that there was no clear punching out at Officer Brown, but there was thrashing about, flail our arms. There was no testimony at the trial that the appellant was thrashing about or flailing her arms; the question never arose.

Upon trial de novo (Appendix A-4), there was no mention in regard to any assault upon Officer Brown, yet the Superior Court of New Jersey, Law Division affirmed the conviction of the trial court.

The judgment of the Superior Court of New Jersey, Appellate Division (Appendix A-1), affirmed the judgment of the Law Division (Appendix A-3) which found the defendant guilty of the assault and preventing a lawful arrest.

2. Where the only evidence the State presented to support its charge of resisting arrest is the bald conclusion of the arresting officer that the appellant resisted arrest (Appendix A-1), shall a conviction survive or be subject to reversal as being in conflict with defendant's rights under the Fourteenth Amendment to the Constitution the United States of America?

On 15 February, 1989, the Superior Court of New Jersey, Appellate Division, affirmed the conviction of the appellant substantially for the reasons stated by the Superior Court, Law Division in its oral opinion issued upon trial de novo, June 22, 1988. The Law Division limited its review solely to questions in regard to credibility, and considered only the issue in regard to

resisting arrest. Review in regard to the conviction of simple assault could not be had, as there was no mention of any alleged assault in the trial court. Nevertheless, the petitioner stands convicted of that charge. The only testimony in regard to the resisting of Officer Brown's arrest is stated in the judgment of the Superior Court of New Jersey, Appellate Division. (Appendix A-1) At that, the last five lines of Footnote 3 on page 5 leave out a part of the testimony of Officer Brown, which needs to be restored to its position between the last two sentences:

Q So did you announce to the defendant that she was being arrested?

A Yes. I told her she was under arrest.

Q And your handcuffs were discharged from your (indiscernible)?

A At that time I (indiscernible).

Q (Indiscernible) resisting from the point that you announced that the —that she was under arrest was the resistance—

3. Where adjudicated facts subject to judicial notice and brought to the attention of the Superior Court of New Jersey, Appellate Division, are excluded and/or determined to be without merit, shall a conviction survive or be subject to reversal as being a violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States of America.

Paragraph (3) of Rule 9 of N.J.S.A. 2A:84A-16, adopted by the Supreme Court of New Jersey effective September 11, 1967 states:

> "Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party notice thereof in the pleadings or at least 20 days before the trial.The judge, however, may permit such notice to be given at any time in the interest of justice. In the absence of an adequate basis for taking judicial notice of the law of any jurisdiction other than this State, and theUnited States, the judge shall apply the law of this State."

Said paragraph (2) of this rule states, in part, that:

> "Judicial notice may be taken, without request by a party, of ..... (b) records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this state."

These provisions appear to require the Superior Court of New Jersey, Appellate Division, to take notice of the issues that have been brought before the United States District Court for the District of New Jersey (Appendix A-8), as well as to notice the appeal of that decision to the United States Court of Appeals for the Third Circuit (Appendix A-5). There is mention of every major proceeding in the judgment of the Superior Court of New Jersey, Appellate Division, other than those that took place at the Federal level, even though reference is made to the Federal proceedings in the briefs of both parties. The appellant's petition for removal contains the constitutional issues brought before the court, lacking opportunity elsewhere, and is properly before the court as held in Chicago, R.I. & P. RY. Co. v. Brazzell, 124 P.40, Leavenworth, Northern & Southern Ry. Co. v. Herley et al., 45 Kan. 535, 539, 26 P.23; Shumaker et al. v. O'Brien, 19 Kan. 476. Said Rule 9 (Appendix A-14), appears to be in conflict with Federal Rules of Evidence, Article II, Rule 201 (d) (Appendix A-13) in the respect that the Superior Court of New Jersey, Appellate Division, has listed petitioner's 13 Points and argument of counsel at the trial de novo, (Appendix A-1) which includes argument on adjudicative facts of the case not subject to dispute; yet, that Court concludes they are without merit and do not require extended discussion.

4. Where the State court has been noticed by way of petition as to the violation of Defendant-Appellant's right to a speedy trial guaranteed under the Sixth Amendment to the Constitution of the United States of America, shall a conviction be allowed to stand based on testimony that has taken place at a time in which defendant was engaged in seeking to enforce her right to a speedy trial in the Federal court system?

The petition states that this prosecution was commenced on September 1, 1986, brought to trial on March 20, 1987, appealed April 7, 1987, reversed on May 28, 1987 and remanded to

the Municipal Court for a new trial. Moreover, also a part of the petition (Appendix A-10), is the statement that the petition was filed within thirty days of the date the petitioner was notified that the State was proceeding with a new trial, which notification was dated August 31, 1987, the last day on which non-indictable charges could have been brought against the officers. Petitioner brought the argument in regard to the violation of her right to a speedy trial before the United States District Court, lacking opportunity in the Municipal Court of the City of Newark, as well as argument in regard to the violation of her rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States of America.

5. Shall the record be permitted to stand corrected by the Superior Court of New Jersey, Appellate Division, so as to erroneously show not only that the Defendant-Appellant paid $210 in fines and penalties, but also to show that Officer Schillizzie's charges be resolved to be a charge of preventing him from perfecting a legal arrest?

The Defendant-Appellant was brought under the jurisdiction of the state court system of New Jersey by virtue of a complaint of simple assault and two complaints, each containing the name of a different officer, but both of which charge the defendant with "purposely prevent a law enforcement officer from effecting a lawful arrest." The vague nature of the complaints is attested to by the exchange in Newark Municipal Court which took place after the state had already prosecuted the complaints through one trial:

> THE COURT: What's the State got?
> MR. FORD: There are two resisting arrest charges your Honor.
> THE COURT: Who are the complaints?
> MR. OLIVERAS: The resisting arrest by Officer (indiscernible) and also resisting arrest by Officer Brown. I think in view of —of the history of facts shown, that it is one incident, as alleged by the State. And as alleged by the State's witness.
> THE COURT: Let me get this straight, now. Two officers, each charged resisting arrest?

At the conclusion of the trial the judge found that the charge made by Officer Schillizzie charging Elaine Kenna with resisting arrest was not the proper charge - the thrust of the actions should be contained in New Jersey Statute 2c:29-1 and/or 3. It's rather, obstructing with the administration of law and/or hindering apprehension. As to Officer Brown, what he observed of the reactions relating to what Officer Schillizzie was doing and the fact that Elaine Kenna was upon him and the matter that he — she was, was certainly the probable cause to make the arrest, without regard to a need to charge anything else, even though it didn't result in . proper charge.

Clearly, this does not describe probable cause to arrest as being in actions between the defendant and Officer Brown. The Superior Court, Appellate Division, originated the term perfecting an arrest which was not mentioned in the courts below. Evidence suggests that Officer Schillizzie's arrest was not legal and the probable cause for the arrest of the Defendant-Appellant lied in that illegal arrest.

In United States v. Cohen Grocery Co., 264 F.218, 220(1920), the Court ruled that a criminal statute which is so vague that it leaves the standard of guilt to the variant views of the different courts and juries does not measure uo to constitutional standards. Specifically regarding the complaint, United States v. Cruikshank, 92 US 542, 544, 558 (1876) and United States v. Simmons, 96 US 360 (1878) have held it to be a constitutional right to have the complaint appraise the defendant with reasonable certainty, the crime charged so he may make his defense.

6. Whether the record of this prosecution is a record of the deprivation of the Defendant-Appellant's right under the Sixth Amendment to the Constitution of the United States of America to be confronted by her accusers.

The defendant-appellant was arrested by a police officer and brought to a police station in which other officers were present and the arresting officer was not. The charges were left up to the commanders of the Port Authority Police, and they did not ask Officer Schillizzie about witnesses who had been present at the first trial, in regard to their availability for the second trial, at which they did not appear. Officer Brown did not appear at one of

the pre-trial hearings, and the Prosecutor either did not have the resources and/or the manpower to appear in the United States District Court for the District of New Jersey. An attorney for the Port Authority of NY & NJ took his place.

7. Shall a conviction be allowed to stand where the Superior Court of New Jersey, Appellate Division, having been notified in regard to defendant's being compromised by omissions in the transcript, finds the transcript in the Newark Municipal Court to contain a substantial number of "indiscernible" omissions, some in significant places, yet, after careful review of the record, concludes that the argument in regard to omissions is without merit?

Immediately before the Municipal Court judge expresed his findings, the transcript reads as follows:

> THE COURT: Defense rests?
> MR. OLIVERAS: Yes.
> THE COURT: Any rebuttal? You rest? Okay. Will there be statements, gentlemen?
> MR. OLIVERAS: Yes, your Honor.
> THE COURT: All right. How long will they be?
> MR. OLIVERAS: Very briefly. Your Honor —
> THE COURT: Mr. Oliveras, what I'm going to do is I'm going to take a brief recess for a minute or two
> (END OF TAPE 87 11 17 c-1.)
> (BEGINNING OF TAPE 87 11 17 c-2.)
> THE COURT: —flair our arms (Appendix A-7)

CONCLUSION

Defendant-Appelant, Elaine Kenna, respectfully requests the court to review the questions presented by the appeal.

Respectfully submitted,

Saturday, July 29, 1989

Elaine Kenna
33-06 92nd Street
Jackson Heights, NY 11372
(718)458-9406

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TABLE OF AUTHORITIES

1 TABLE OF AUTHORITIES

2 COPIES OF OPINIONS, ORDERS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW DELIVERED UPON THE RENDERING OF THE JUDGMENT BY THE COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED. THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The Superior Court of New Jersey, Appellate Division, has affirmed the judgment of the Superior Court, Law Division, upon review, and has filed its findings with the clerk of that court on February 15, 1989, a copy of which is included in the Appendix.

3 COPIES OF OPINIONS, ORDERS, FINDINGS OF FACT, AND CONCLUSIONS OF LAW BY COURTS OTHER THAN THE COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED

Superior Court of New Jersey, Law Division

Ordered and adjudged that judgment of the Municipal Court of the City of Newark, rendered at the second trial ended November 17, 1987, was affirmed by judgment filed with the clerk of the court on June 22, 1988, upon trial de novo of that same date. A copy of both the judgment and the opinion of that court is included in the Appendix.

Municipal Court of the City of Newark

A copy of the judgment and the findings of the Court after the second trial held on November 16, and November 17, 1987 are included in the Appendix.

United States Court of Appeals for the Third Circuit

A copy of the order, entered March 29, 1988, denying an appeal from the judgment of the United States District Court for the District of New Jersey to the United States Court of Appeals For The Third Circuit is included in the Appendix.

United States District Court for the District of New Jersey

The order and findings of the Court are included in the Appendix in regard to the denial of a Petition to remove the case to that jurisdiction. as entered by the clerk of the court on November 16, 1987.

Superior Court of New Jersey, Law Division

The letter of May 28, 1987 by which this court determined it could not hear the appeal from the judgment of the first trial, de novo on the record, and remanded the case to the Municipal Court of the City of Newark from which the appeal was taken, is included in the appendix.

Municipal Court of the City of Newark

The judgment of this court and its findings after the first trial that took place on March 20, 1987 is included in the Appendix.

4 STATEMENT OF THE GROUNDS FOR INVOKING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

On 15 February 1989, the Superior Court of New Jersey, Appellate Division, affirmed the judgment of the Superior Court of New Jersey, Law Division, for the reasons stated in the Law Division's oral opinion of 22 June 1988. Appendix A-1. The Supreme Court of New Jersey denied a petition for certification of judgment of the Superior Court of New Jersey, Appellate Division, by its order of 2 May 1989, filed 4 May 1989.
Appendix A-1 The jurisdiction of this Court is invoked under Title 28, United States Code Section 2254, as well as under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America.

5 STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions and statutes are included in the Appendix.

6 STATEMENT OF THE CASE

On 2 May 1989, the Supreme Court of the State of New Jersey denied certification to review the conviction of the Defendant- Appelant for violation of N.J.S. 2C:29-2, purposely preventing a law enforcement officer from effecting a lawful arrest and a conviction of simple assault upon that officer in violation of N.J.S. 2C:12-1(a)(1).

Case involves an incident in which the defendant-appellant was arrested on September 1, 1986, as is described in the Petition for Removal (Appendix A-14) wherein the State of New Jersey brought the matter to trial on March 20, 1987, which ended in a mistrial. The defendant-appellant tried to find out the reason for the delay in bringing the matter to a second trial and was told that the State could not locate the complaint. By way of the Petition for Removal, the defendant-appellant brought the matter before the District Court of the State of New Jersey, where it was decided that there was no jurisdiction for removal. Defendant-appellant was notified in regard to the second trial by process dated August 31, 1987, the last day on which non-indictable charges could have been brought against the officers who brought complaints.

The second trial contained no testimony of any kind in regard to an assault which was one of the charges brought against the defendant-appellant. Uncorroborated and conflicting testimony of the arresting officer charging the defendant-appellant with "purposely prevent a law enforcement officer from effecting a legal arrest" in which significant portions of the testimony are unintelligible formed the basis for a conviction of that statute.

7 REASONS QUESTIONS PRESENTED REQUIRE ARGUMENT

Defendant-Appellant has been found guilty of an offense with no testimony to indicate she committed such an offense. This is a matter of public concern. It requires inquiry into the area of judicial notice as well as preserving issues on the record by Federal jurisdiction, lacking opportunity under State jurisdiction.

8 APPENDIX

APPENDIX

A-1

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-15-88T1

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ELAINE KENNA,
Defendant-Appellant.

ORIGINAL FILED
FEB 15 1989
Emillie R. Cox, Esq.
Acting Clerk

Submitted January 31, 1989 - Decided FEB 15 1989

Before Judges Pressler and Stern.

On appeal from Superior Court of New Jersey, Law Division, Essex County.

Elaine Kenna, pro se, for appellant.

Herbert H. Tate, Jr., Essex County Prosecutor, attorney for respondent (William D. Ware, agent to the prosecutor, of counsel and on the brief).

PER CURIAM.

After being permitted to withdraw a guilty plea to one of the offenses, defendant was found guilty on two complaints charging her with preventing Port Authority police officers from making a lawful arrest, N.J.S.A. 2c: 29-2, and simple assault upon one of those officers, Douglas Brown, N.J.S.A. 2c:12-1(a)(1). Defendant was convicted on all three charges, and fines, costs

and penalties for the benefit of the Violent Crimes Compensation Board were imposed. On appeal to the Law Division, the matter was remanded because of an unintelligible record, see R. 3:23-8(a). 1 On remand defendant was found guilty of the assault on Officer Brown and of preventing him from perfecting a lawful arrest. She was acquited of the second charge under N.J.S.A. 2c: 29-2 relating to preventing another officer from perfecting a lawful arrest.

The assault was merged into the other conviction, and a total of $300 in fines, costs and penalties were imposed.Defendant was credited for a larger amount previously imposed, as the judge vacated the prior sentences imposed on the merged assault and the charge for which defendant was ultimately acquitted. On appeal to the Law Division defendant was again found guilty of violating N.J.S.A. 2c:29-2, and fines, costs and penalties totaling $210.00 were imposed.

On this appeal defendant argues 2

POINT 1 THE REVIEWING COURT ERRED IN STATING THAT THERE IS SUFFICIENT TESTIMONY FROM OFFICER BROWN.

POINT 2 THE REVIEWING COURT ERRED IN STATING THAT OFFICER BROWN STATED THERE'S NO QUESTION THAT SHE UNDERSTOOD SHE WAS UNDER ARREST.

POINT 3 THE REVIEWING COURT ERRED IN BASING ITS FINDING OF CREDIBILITY ON THE FACT THAT IT IS NOT INCONCEIVABLE THAT THE RESISTING OCCURRED AS OFFICER BROWN SAID.

1 we have not been furnished with the record of the first trial, but have obtained this information from the record of the subsequent proceedings and information contained on the disposition portion of the complaints supplied in defendant's appendix.

2 we bypass consideration of the procedural defects in defendant's brief since defendant represents herself pro se on this appeal.

POINT 4 THE REVIEWING COURT ERRED IN SIMPLY STATING THAT OFFICER SCHILLIZZIE SAID HE SAW THE DEFENDANT ON TOP OF HIM; WHEREAS THE ENTIRE RECORD JUST AS CLEARLY SHOWS THAT THE DEFENDANT WAS NOT ON TOP OF OFFICER SCHILLIZZIE.

POINT 5 THE REVIEWING COURT ERRED IN ITS FINDING THAT FLAILING AROUND CONSTITUTES RESISTING ARREST.

POINT 6 THE PROSECUTOR PREJUDICED THE RIGHTS OF THE DEFENDANT BY MAKING THE ERRONEOUS STATEMENT THAT OFFICER BROWN SAW THE DEFENDANT PULLING OFFICER SCHILLIZZIE'S HAIR.

POINT 7 THE PROSECUTOR PREJUDICED THE RIGHTS OF THE DEFENDANT BY STATING THAT THERE WERE NO PRIOR DEALINGS WITH REGARD TO THE OFFICERS AND THE DEFENDANT WHEN THERE IS NO BASIS IN THE TRANSCRIP TO SUPPORT SUCH A REMARK.

POINT 8 THE TRIAL COURT ERRED IN ITS FINDING THAT THE ACTS ALLEGED TO HAVE BEEN COMMITTED WERE THRASHING ABOUT, AS THERE IS NO TESTIMONY THAT THE DEFENDANT WAS THRASHING ABOUT.

POINT 9 THE TRIAL COURT ERRED IN ITS FINDING THAT TOUCHING AND PERMISSIVE ILLEGAL CONTACT MEET THE REQUIREMENTS FOR A CONVICTION UNDER NEW JERSEY STATUTE 2c:29.

POINT 10 DEFENDANT'S CASE WAS COMPROMISED BY OMISSIONS IN THE TRANSCRIPT.

POINT 11 DEFENDANT MUST HAVE THE OPPORTUNITY TO FACE HER ACCUSERS.

POINT 12 PROOF THAT DOUGLAS BROWN WAS IDENTIFIED TO THE COURT AS A POLICE OFFICER WAS NOT HAD.

POINT 13 THE VERDICT MUST BE TRUE TO THE CHARGES.

On the trial de novo, defendant's argument was summarized by counsel

> first, that Brown's testimony should not be credited, because it conflicts with the testimony of others, and he was not at the scene long enough to understand who was who and what was going on. In fact, to distinguish between (defendant) and her other sister who was in close proximity, also with blonde hair, who said that Officer Brown pulled her away from the crowd immediately before he placed (defendant) under arrest, and second, that on the question of intent, the State simply didn't elicit testimony from Officer Brown or from anyone else to show that Miss Kenna had the requisite intent trying to evade Officer Brown. The other Officer who testified, Officer (Schillizzie), he said he did not see what happened at the time that Officer Brown attempted to place Miss Kenna under arrest.

Our careful review of the record leads us to conclude that these arguments are without merit and do not require extended discussion. R. 2:11-3(e) (2). We add only that our scope of review is quite different from that of the Law Division, which must decide the case de novo, see State v. Johnson, 42 N.J. 146, 160-163 (1964). In this case, the Law Division judge clearly recognized her responsibility under Johnson to make a de novo determination as to guilt or innocence. The Law Division Judge reached independent conclusions, essentially based on resolution of a credibility dispute, and although she could do so only by giving deference to the relevant views of the municipal court judge who initially tried the case, see id. at 161, she nevertheless pointed to specific factors and testimony, independent of what the prosecutor suggested was contained in the record, to support her conclusions. 3

Finally, while we note that the transcript of the proceedings in the Newark Municipal Court contain a substantial number of "indiscernable" omissions, some in significant places,we are nevertheless satisfied that the essence of the testimony is clear and was sufficient to support the conviction. Based on our scope of review, we also find sufficient evidence to affirm.

Accordingly, the judgment is affirmed substantially for the reasons stated by Judge Frances M. Cocchia in her oral opinion of June 22, 1988.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Acting Clerk

---

3 Despite the testimony of Officer Schillizzie, defendant was acquitted of preventing a lawful arrest of Michael Gallagher because the municipal court judge found that the wrong charges were brought on this complaint. See N.J.S.A. 2c:29-3. Schillizzie's testimony was basically directed to defendant's striking and choking him, and Schillizzie made few relevant observations of defendant with respect to Brown. We do not believe that Judge Cocchia's reference to defendant being on top of Schillizzie is controlling except, perhaps, as to the defendant's resulting in Brown's decision to arrest her. In any event, Officer Brown testified that "I told (defendant) she was under arrest. And (indiscernable) to handcuff her (indiscernable). And I (indiscernable) continued to struggle and (indiscernable) to resist (indiscernable). Yes, she continued to resist my efforts to put the handcuffs on."

A-2

SUPREME COURT OF NEW JERSEY
C-955 September Term 1988

30,151

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs. ON PETITION FOR CERTIFICATION

ELAINE KENNA,

Defendant-Petitioner.

FILED
May 4, 1989
Steven w. Townsend
Clerk

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-15-88T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 2nd day of May, 1989.

I hereby certify that the foregoing
is a true copy of the original on file
in my office
steven w. townsend
clerk of the supreme court
of new jersey

STEVEN W. TOWNSEND

CLERK OF THE SUPREME COURT

A-3

SUPERIOR COURT OF N.J.
ESSEX COUNTY - LAW DIVISION
MUNICIPAL APPEALS

MA 208-87 A

STATE OF NEW JERSEY
V.
ELAINE KENNA

ON APPEAL FROM CONVICTION FROM NEWARK.
FOR VIOLATION OF 2C: 29-2

JUDGMENT

The above stated appeal having been filed on November 20, 1987 and set down for trial on June 22, 1988 before Judge Hon. Francis M. Cocchia

THE MATTER HAVING BEEN TRIED AND FINDING OF Guilty HAVING BEEN RENDERED:
It is therefore, on June 22, 1988
ORDERED AND JUDGED THAT judgement is affirmed

in addition to the sum of $8.50 for costs heretofore paid to the County Clerk (in the event of a "guilty" verdict or dismissal of the appeal)

Judge Hon. Frances Cocchia

Entered by: John T. Lyons, Jr.
Notice sent to Municipal Court and
Municipal Court Judge on June 22, 1988

THE COURT: All right.

The Judge who sat below had an opportunity to observe the witnesses, to assess their credibility and make his findings, which he did.

It is a question of whether Officer Brown was telling the truth, or Miss Kenna, because it is in conflict. We wouldn't be here if there was no conflict.

Officer Scalizzy did, Ms. Alito, say he saw her on top of him. There was testimony to that. I just happened to open to the correct page. Page 20. He did say that he saw her.

Officer Brown stated there's no question that she understood she was under arrest. Even from her version, because she said he told me – I told him to take me. She put out her arms.

The officer stated that he told her she was under arrest, and she should have known, even from her own testimony that he was a police officer, because she said she submitted. He said no, she didn't, that she was resisting, but the judge found she was flailing around, to quote the judge below. Those were his findings of fact.

In this Court's opinion, it's a question of credibility, and there is sufficient testimony from Officer Brown.

In addition, as to credibility, the Court must give due defference to the Judge below who observed the witnesses, and certainly it's not inconceivable that this occurred as Officer Brown said.

It is a question of fact as to whether or not Officer Brown told her he was a police officer, told her that she was under arrest.

As to her intent, you said she didn't have the requisite intent. What was her state of mind? From her own testimony there's no question she knew she was under arrest. The only difference is, the only question is did she resist.

The fact he was a police officer she knows. The fact that he said she was under arrest, she knew, because she said she submitted. The only difference is Officer Brown said that she did not submit as she stated that she did, and the Judge found that she was flailing around, to quote the Court.

I find that she is guilty of resisting arrest.

I think she paid the fine, didn't she?

MS. ALITO: Yes.

MS. KRONE: Thank you, Judge.

MS. ALITO: Thank you, your Honor.

THE COURT: You're welcome.

(Whereupon the proceedings are concluded.)

A-5 CPS-118 March 10, 1988

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 87-5891

STATE OF NEW JERSEY

FILED
vs.
Mar 30, 1988

KENNA, ELAINE
At 8:30 M
(N.J. Civ. No. 87-299-01) William T. Walsh
Clerk

Present: SLOVITER, MANSMANN and SCIRICA, CIRCUIT JUDGES

Submitted are:

(1) By the Clerk for possible summary affirmance pursuant to Internal Operating Procedure No. 17;

(2) Appellant's response; and

(3) Appellee's response
in the above-captioned case.

Respectfully,

SALLY MVROS/MW

Clerk

SM\MW

enc.

The foregoing motion for summary affirmance is granted.

A TRUE COPY

FRANCES R. MATYSIK,

Deputy Clerk

By the Court,

_____

Circuit Judge

Dated: Mar 29 1988
ade/cc: HG
EK

A-6 STATE OF NEW JERSEY CLERK'S OFFICE K 2139-86
Municipal Court of NEWARK 31 GREEN ST. K 2140-86
County of ESSEX 2nd Floor Docket No. K 2201-86
City Hall Annex Building
Newark, N.J. 07102

STATE
V.
Elaine Kenna
Defendant

ORDER
Payment of Fines and Costs
Total
210.00

The defendant, SAME AS ABOVE, having been charged with a violation of 2c:12-1A, 2c: 29-2 on 9/1 , 1986, and having been convicted and sentenced to pay a fine of $150 and $20+30 VC+ 10 VC FICK 2140 costs and appearing that the defendant presently is unable to pay the fine and costs in full.

It is Ordered that the defendant pay $210.00 IN FULL commence 4/8/87 on account of said fine and costs.

Payment shall be made in cash to the clerk of the court or by mailing check or money order made payable to this court properly identified with the Docket number or Ticket number thereon as shown above

If subsequent to the entry of this Order, the defendant is unable to make payment as Ordered, the defendant shall immediately advise the court in writing, why payment cannot be made.

For failure to comply with this Order, a warrant may be issued for the arrest of the defendant charging the defendant with contempt of court (N.J.S.A. 2A:10-1c.).

Date: 3/20/87

Paul R. Daniele
Judge

Acknowledge receipt of a copy of and understand this Order:

Elaine Kenna
(Defendant)
Telephone No. (718)458-9406
D.O.B. 9/16/66
S.S. # 053-46-3958
White Blue

33-06 92 ST
Jackson Heights, NY
K 05509 80322 626000 66 NY
Driver License No. State

—flail our arms about as a result of these activities. I do not find that to be the more serious part of what occurred but more a continuing action within the sequence of events. These are my conclusions and findings of fact and I now must apply these findings to the charges before this Court.

First as to the charge made by Officer Schillizzie charging Elaine Kenna with resisting arrest. I do not believe that's the proper charge. I believe that the thrust of the actions should be contained in New Jersey Statute 29: — 2c: 29 1 and/or 3. Not from what I've heard resisting arrest. It's rather, obstructing with the administration of law and/or hindering apprehension. I do not find it within my reading of resisting arrest that this would be an appropriate charge. Defendant will, therefore, be found not guilty of Officer Schillizzie's charge of resisting arrest.

As to the other charge before the Court, simple assault and resisting arrest, I find that the probable cause existed in the non charge. What Officer Brown observed of the reactions relating to what Officer Schillizzie was doing and the fact that Elaine Kenna was upon him and the matter that he — she was, was certainly the probable cause to make the arrest. Without regard to a need to charge anything else, even though it didn' t result in a proper charge, that during the course of these events she did commit the acts alleged, that is thrashing about. I don't find that there was any clear punching out at him. A flailing of the arms, sure. Touching and permissive illegal contact, sure. I find that it falls primarily within the purview of resisting Officer Brown's arrest.

And the allegations in K2140, simple assault, I will dismiss and merge into the resisting arrest, finding them to be substantially the same matters. Not guilty outright as to 2139, resisting arrest. Simple assault, complaint of Officer Brown, is merged into resisting arrest K2201. Defendant found guilty of one resulting charge K2201. Officer Brown's allegation of resisting arrest.

The Court has already commented that there were other charges. There was a likelihood of conviction as to those, but

they were not made and I can't deal with them.

I find myself in a difficult situation. I — I come to my own conclusions. I've heard it all. I haven't heard what the other Judge heard. Maybe I've heard more, maybe I've heard less. And maybe my perspective is a little bit different and I don't know how to allow for any of that.

My conclusions, I'm going to try and make as independent as I can. I'm going to try and not be guided by what has occurred in the past. Neither to the benefit nor to the detriment of this defendant.

My conclusion is — is I'm impressed, quite frankly, with the defendant, and frankly with the family. I almost didn't need Mr. Oliveras. I probably could have told you the background of this defendant without you putting her back on the stand to tell me what her background was. I perceived it more or less exactly what it would be. Not exactly as to the school and university or the background, but I think more or less close it did come through to me. I wasn't surprised by it.

But yet what I do find that what was a bother to me was her testimony as to what she did and why she did it and not recognizing that — accepting to a large extent what she said, it was wrong under those circumstances. Not that it wasn't a bad situation or a good situation or other people were bad, too, and they were doing wrong things. I accept that. But what you — what you did, in my opinion, frankly, didn't make it any better. And I think that's what this is all about.

MR. OLIVERAS: So it's 400 total, your Honor. She's already paid 190.

THE COURT: Why wasn't the rest of it paid? Is it to pay or something?

MR. OLIVERAS: There was only $10 that was left; is that correct?

THE COURT: We just got — wait a second. Wait a second. Show him one more time. The total you're telling me is 390. Right?

MR. OLIVERAS: 200, 400, your Honor, total fine —

THE COURT: Total is 400?

MR. OLIVERAS: Yes.

THE COURT: 190 was paid.

MR. OLIVERAS: Was paid.

THE COURT: That's $210 not paid.

MR. OLIVERAS: You paid everything already? She paid everything, your Honor. Do you have a receipt?

MS. KENNA: The first $190 was the first time I came they refunded me my bail money and (indiscernible, microphone).

THE COURT: I see a separate receipt here for $200—

MR. OLIVERAS: Do you have any receipts?

MS. KENNA: Not with me.

MR. OLIVERAS: Who has them? Tell your mother to come over. Yes.

THE COURT: You're right. It has been paid. $390 has been paid. Anyway, 390. It's $10 off, but I'm not going to argue with it.

MR. OLIVERAS: But that's the only thing that is left. Looking at the — transcript, there are $400—okay. No, she'll get a number and call right back in five minutes. I'm sorry.

According to the transcript there are $400 and fines and Court costs and penalties.

THE COURT: Okay. And according to her receipts now that I have reviewed it, it appears that $390 was paid. It appears to have been a $10 error, but that's not going to be the problem. I'll resolve that one way or the other.

A-8

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY,	:	CRIMINAL ACTION #87-299(SSB)
vs.	:	
ELAINE KENNA,	:	ORDER
Petitioner.	:	

This matter having been brought before the court on Petitioner Elaine Kenna's Petition for Removal, pursuant to 28 U.S.C. & 1446(c) (1) ; and

The court having considered the submissions and oral argument of the parties; and

For the reasons stated in the court's opinion filed this date,

IT IS on this 16th day of November, 1987, hereby ORDERED that Petitioner Elaine Kenna's Petition for Removal is DENIED.

No costs.

STANLEY S. BROTMAN
UNITED STATES DISTRICT JUDGE

A-9 NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY, : CRIMINAL ACTION #87299(SSB)

VS. :

ELAINE KENNA, : OPINION
Petitioner. :

APPEARANCES:

MS. ELAINE KENNA
33-06 92nd Street
Jackson Heights, NY 11372
Petitioner, Pro Se

PAUL LUCAS, ESQUIRE
Municipal Prosecutor
Municipal Court of the City of Newark
Municipal Court Building
31 Green Street
Newark, NJ 07102

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
BY: JAMES CRAWFORD ORR, ESQUIRE
One Gateway Center, Suite 1600
Newark, NJ 07102-5311

MICHAEL DRISCOLL, ESQUIRE
PORT AUTHORITY LAW DEPARTMENT
One World Trade Center
66th Floor
New York, NY 10048

BROTMAN, District Judge:

This matter comes before the court upon Petitioner's Petition for Removal of her criminal prosecution from the municipal court of the city of Newark, pursuant to 28 U.S.C. & 1446(C) (1). Petitioner Elaine Kenna has been charged with simple assault under N.J.S. 2c: 12-1(a) (1).

"The right to remove a case from a state to a federal court is purely statutory and therefore is entirely dependent on the will of Congress." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d & 3721. Absent specific statutory authorization, this court is without jurisdiction to grant a petition for removal. No such authorization exists in the present case.

Congress has provided for removal of a criminal prosecution in three situations: a prosecution of a federal officer, 28 U.S.C. & 1442, a prosecution of a member of the armed forces, 28 U.S.C. & 1442a, and a prosecution which denies the defendant "the equal civil rights of citizens of the United States," 28 U.S.C. & 1443. The matter involving Ms. Kenna does not fall within any of these categories. Consequently, the present action is simply not removable to this court and the Petition for Removal must be denied.

An appropriate order will be entered.

STANLEY S. BROTMAN
UNITED STATES DISTRICT JUDGE

DATED: November 16, 1987.

A-10

NEWARK MUNICIPAL COURT
ESSEX COUNTY, NEW JERSEY

STATE OF NEW JERSEY, PLAINTIFF, DOCKET NOS. K-2201-86, K-2139-86 AND K-2140-86

vs

ELAINE KENNA, DEFENDANT MA 70-87

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

1. Petitioner is the Defendant in the above-entitled prosecution, and has been charged with violating N.J.S. 2C:12-1(a)(1), attempting to cause bodily injury to a police officer by punching him in the chest and has been charged with two counts each, of purposely preventing a law enforcement officer from effecting a lawful arrest.

2. The prosecution was commenced on September 1, 1986 by the filing of the three complaints in the Municipal Court of the State of New Jersey, in and for the County of Essex. Which prosecution was brought to trial on March 20, 1987, appealed on April 7, 1987 reversed on May 28, 1987 and remanded to the Municipal Court for a new trial.

3. Petitioner was arrested by the Port Authority Police on September 1, 1986 in the City of Newark, County of Essex, and her arrest was effected by and for the continuance of aiding, abetting and perpetuating customs and usages which have deep historical and psychological roots in the mores and attitudes which exist among Port Authority Police Officers within the City of Newark, County of Essex with respect to maintaining a fraternity among employees of the Port Authority of NY & NJ. Petitioner was arrested while standing amidst a group of persons employed at the airport. One of these airport employees to whom Petitioner had been speaking told her to talk a little better, and a Port Author-

ity employee told her it was in her best interest to leave the area. Thest two individuals along with a third airport employee had been blocking the automobile in which the Petitioner was attempting to leave the airport, holding her captive. After a number of threats by airport personnel, Petitioner was struck and pushed, called for the police to come to her aid, was ignored by two police officers who were in the area, and an acquaintance of hers came to her aid. The acquaintance pushed the individual who had hit her, and the police arrested the acquaintance.Many more police officers arrived in patrol cars, pushed, stepped on, and cursed at people in the area, used excessive unwarranted force against the acquaintance of Petitioner who had already beenhandcuffed and arrested without just cause.

Petitioner went to aid that acquaintance to prevent him from incurring more serious injury than he had already sustained, and was grabbed, pushed back and forth forcibly between officers, despite the fact she offered no resistance, and after a time was dragged to a police vehicle after being handcuffed and arrested without just cause. She was taken to Port Authority Building #10, subjected to a search in the presence of her acquaintance and a number of police officers. Afterward she was handcuffed to a chair where she would remain for five hours without being allowed to go to the toilet or receive medical attention. Throughout a sleepless night, she was subjected to abuse of Port Authority police officers who had removed their badges. At 5:00 A.M. Petitioner's father phoned to notify the police that bail had been raised. He had been told earlier by a police officer at the scene of the arrest that Petitioner could be released after four hours, but later was told by officers at Building #10 that Petitioner was not eligible for release until thirty six hours after her arrest. Accordingly, Petitioner's father not knowing at what time Petitioner could be released, asked to speak to her and was told that she was asleep, resting comfortably with a blanket and could not come to the phone. Conversely, at that time she was awake, in pain, and would have been out on bail within the hour had the truth been told. Instead Petitioner was not out on bail until approximately 1:00 P.M., eight hours later.

The Petitioner's acquaintance was arrested only after the arresting officer had spoken to an airport limousine driver who had been involved in a quarrel with that acquaintance, then spoke

to the acquaintance, heard Petitioner yell, followed the acquaintance as he went a short distance to aid the Petitioner and watched as the people said, no, not me, no, not me. Then seeing him push the person who had been identified as the one who had struck Petitioner, this officer went on top of him and arrested him. When many other police arrived in police cars and started without cause to attack the acquaintance, Petitioner went to his aid to protect him from more serious injury than he had already sustained. After the arrests, Petitioner's father spoke to people in the area, and a gentleman from Cincinnati told him he saw the police act improperly and was willing to so testify in court. After Petitioner's sister had taken down the name and address of this man, a Port Authority police officer came over to him and told him should he ever so testify in court, he would never again work at Newark Airport.

Petitioner's father went to Building #10 to notify those in charge that Petitioner had been arrested without just cause and was told no police were at the scene of the arrest until the acquaintance had pushed the airport employee who had hit and pushed petitioner. The officer in charge was immediately notified that his imformation was not correct and he was requested to call in the arresting officers to set the record straight. His reply was he had no power to do so. Next Petitioner's father stated to this officer that he wanted to file a complaint against the person who had instituted the incident by cursing repeatedly at Petitioner's family, and continued it by claiming that she had been hit. This particular complaint had been given to another officer at the scene of the incident before anyone had been pushed or arrested, and the complaint was at that time ignored. Once again it was ignored as Petitioner's father was told it could only be made at 31 Green Street. As a result an incident report was filed in which the Petitioner was charged with acts that are criminal, have no basis in fact and have been proven to be untrue. Yet this incident report is on file in the Newark Police Department for all to see.

4. By reason of the aforesaid, the transcript, the brief and affidavit annexed which show a continuation of a cause proved to be defective and lacking substance, yet being prosecuted, and also by reason of the Constitution of the State of New Jersey in respect to allowing cases prosecuted without indictment to be adjudicated without benefit of trial by jury upon agreement secured thereto by means of papers that are offered to Defendant for signature at a

time when he or she is under duress and not made aware that the right to trial by jury is being surrendered.

5. The Petitioner is denied and cannot enforce in the courts of the State of New Jersey rights under the Constitution and Laws of the United States providing for the equal rights of citizens of the United States and all persons within the jurisdiction thereof, in that among other things the State of New Jersey by statute, custom, usage and practice support and maintain a common law practice to deal with cases that are deemed to be misdemeanors that fosters false arrest, the issuance of complaints that are frivolous in nature and prosecuted after shown to be no longer viable.

6. This petition is being filed later than thirty days after arraingment but within thirty days of the date Petitioner has received notice that the State is proceeding with a new trial. It is respectfully submitted that the notice of those proceedings in view of what has gone before is a violation of Petitioner's civil rights.

7. Wherefore in view of these facts Petitioner prays that leave may be granted her to file this petition and an order so issued so the aforesaid criminal proceedings may be removed from the Municipal Court of the City of Newark, County of Essex, to the United States District Court for the District of New Jersey for trial and pray that said prosecution stand so removed as provided for in Title 28, United States Code Annotated Section 1446(c) and (d).

ELAINE KENNA
PETITIONER, PRO SE
33-06 92nd Street
Jackson Heights, NY 11372

Sworn to before me this
day of 1987

A-11

SUPERIOR COURT OF NEW JERSEY

Chambers of
YALE L. APTER
J.S.C

ESSEX COUNTY COURTS BLDG.
NEWARK, N.J 07102

May 28, 1987

Hon. Paul R. Daniele, JMC
Municipal Court of Newark
31 Green Street
Newark, New Jersey 07102

Dear Judge Daniele:

RE: State V. Elaine Kenna
MA 70-87

This Court has reviewed the file and transcript of the recorded proceedings in this matter.

Since the transcript is substantially unintelligible, (specifically at pages 94, 95, 101, 102, 114 through 123, 125 and 127) this Court cannot hear this appeal de novo on the record. As such, pursuant to R 3:23-8(a) and R 3:23-7, this case is being remanded to the Court from which the appeal was taken for a new trial.

Very truly yours,

Hon. Yale L. Apter

/cs-m

N.J.S.A. 2c: 1-13 a

No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absense of such proof, the innocence of the defendant is assumed.

N.J.S.A. 2c: 2- 2b(1)

PURPOSELY. A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.

N.J.S.A. 2c: 29-1

A person commits a disorderly persons offense if he purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an offficial function by means of intimidation, force, violence or physical interference or obstacle, or by means of any independently unlawful act. This section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

N.J.S.A. 2c: 29- 2

a. A person is guilty of a disorderly persons offense if he purposely prevents a law enforcement officer from effecting a lawful arrest, except that he is guilty of a crime of the fourth degree if he:

1. Uses or threatens to use physical force or violence

against the law enforcement officer or another; or

2. Uses any other means to create a substantial risk of causing physical injury to the public servant or another.

It is not a defense to a prosecution under this subsection that the law enforcement officer was acting unlawfully in making the arrest, provided the law enforcement officer announces his intention to arrest prior to the resistance.

b. Any person, while operating a motor vehicle on any street or highway in this State, who knowingly flees or attempts to elude any police or law enforcement officer after having received any signal from such officer to bring the vehicle to a full stop is a disorderly person.

N.J.S.A. 2c: 29- 3

---

a. A person commits an offense if, with purpose to hinder the apprehension, prosecution, conviction or punishment of another for an offense he:

(1) Harbors or conceals the other;

(2) Provides or aids in providing a weapon, money, transportation, disguise or other means of avoiding discovery or apprehension or effecting escape;

(3) Suppresses, by way of concealment or destruction; any evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless of its admissibility in evidence, which might aid in the discovery or apprehension of such person or in the lodging of a charge against him;

(4) Warns the other of impending discovery or apprehension, except that this paragraph does not apply to a warning given in connection with an effort to bring another into compliance with law;

(5) Prevents or obstructs, by means of force, intimidation or deception, any one from performing an act which might aid in the discovery or apprehension of such person or in the lodging of a charge against him;

(6) Aids such person to protect or expeditiously profit from an advantage derived from such crime; or

(7) Volunteers false information to a law enforcement officer.

The offense is a crime of the third degree if the conduct

which the actor knows has been charged or is liable to be charged against the person aided would constitute a crime of the fourth degree. The offense is a crime of the fourth degree if such conduct would constitute a crime of the third degree. Otherwise it is a disorderly persons offense.

b. A person commits an offens if, with purpose to hinder his own apprehension, prosecution, conviction or punishment, he:

(1) Suppresses, by way of concealment or destruction, any evidence of the crime or tampers with a document or other source of information, regardless of its admissibility in evidence, which might aid in his discovery or apprehension or in the lodging of a charge against him; or

(2) Prevents or obstructs by means of force or intimidation anyone from performing an act which might aid in his discovery or apprehension or in the lodging of a charge against him; or

(3) Prevents or obstructs by means of force, intimidation or deception any witness or informant from providing testimony or information, regardless of its admissibility, which might aid in his discovery or apprehension or in the lodging of a charge against him; or

(4) Volunteers false information to a law enforcement officer.

The offense is a crime of the third degree if the conduct which the actor knows has been charged or is liable to be charged against him would constitute a crime of the second degree or greater. The offense is a crime of the fourth degree if such conduct would constitute a crime of the third degree. Otherwise it is a disorderly persons offense.

N.J.S.A. 2c:12-1(a)(1)

a. Simple Assault. A person is guilty of assault if he:

(1) Attempts to cause or purposely, knowlingly or recklessly causes bodily injury to another; or

(2) Negligently causes bodily injury to another with a deadly weapon; or

(3) Attempts by physical menace to put another in fesr of imminent serious bodily injury.

Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons offense.

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter notices. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. (Jan. 2, 1975, P.L. 93-595, Section I, 88 Stat. 1930.)

NEW JERSEY EVIDENCE RULE 9

(1) Judicial notice shall be taken, without request by a party, of the decisional, constitutional, and public statutory law and rules of court of this State and the decisional, constitutional, and public statutory law and rules of court of the United States, and of such specific facts and propositions of generalized knowledge as are so universally known that they cannot reasonably be the subject of dispute.

(2) Judicial notice may be taken, without request by a party, of (a) the decisional, constitutional, and public statutory law and rules of court of every other state, territory and jurisdiction of the United States, private acts and resolutions of the Congress of the United States and of the legislature of this State, and of every other state, territory and jurisdiction of the United States, and duly enacted ordinances and duly published regulations and determinations of governmental subdivisions or agencies of the United States, of this State, and of every other state, territory and jurisdiction of the United States; (b) records of the court in which the action is pending and of any other court of this State or federal court sitting in or for this State; (c) the law of foreign countries; (d) such facts as are so generally known or of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute; and (e) specific facts and propositions of generalized knowledge which are capable of immediate determination by resort to sources of reasonably indisputable accuracy.

(3) Judicial notice shall be taken of each matter specified in paragraph (2) of this rule if a party requests it and (a) furnishes the judge sufficient information to enable him properly to comply with the request and (b) has given each adverse party notice thereof in the pleadings or at least 20 days before the trial. The judge, however, may permit such notice to be given at any time in the interest of justice. In the absence of an adequate basis for taking judicial notice of the law of any jurisdiction other than this State, and the United States, the judge shall apply the law of this State.

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be siezed.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A-16 SUPREME COURT OF THE UNITED STATES

No. A-1064

Elaine Kenna,

Petitioner

v.

New Jersey

ORDER

UPON CONSIDERATION of the application of the

petitioner,

It is ORDERED that the time for filing a petition

for a writ of certiorari in the above-entitled case, be and

the same is hereby, extended to and including

August 2 , 1989

/s/ William J. Brennen, Jr.

Associate Justice of the Supreme
Court of the United States

Dated this 5th

day of July, 1989

A-17

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ELAINE KENNA,
DEFENDANT-APPELLANT,

v.

STATE OF NEW JERSEY,
PLAINTIFF-RESPONDENT.

Elaine Kenna
33-06 92nd Street
Jackson Heights, NY 11372
(718) 458-9406

On Appeal from the Superior Court of New Jersey, Appellate Division A-15 88 T1

Sirs:

PLEASE TAKE NOTICE that Elaine Kenna hereby appeals to the Supreme Court of the United States from the judgement entered in the action of 15 February 1989 in favor of the State of New Jersey.

Appeal is taken to each and every part of the judgement pursuant to Federal Statute Section 2 254 as well as provisions of the Fourth, Fifth, Sixth and Fourteeth Amendments to the Constitution of the United States of America.

Elaine Kenna
Pro Se

Dated: July 28, 1989

NO. 89-249

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ELAINE KENNA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Supreme Court of The State of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

Glenn D. Goldberg
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Essex County Prosecutor's Office
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(201) 621-4683

Debra G. Lynch
On The Brief

The Copy Capitol 75 Walnut Street, Montclair, NJ 07042 • 201-783-3891

30 pp

Question Presented for Review

1. Whether the Petitioner in this case was denied her Fourth, Fifth, Sixth and Fourteenth Amendment rights under the Constitution of the United States of America, by the state trial courts ruling that under the facts of this case, Petitioner is guilty of resisting arrest.

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CASES CITED

STATUTES CITED

NO. 89-249

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ELAINE KENNA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Supreme Court Of The
State of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, the State of New Jersey,

respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the Supreme Court of New Jersey, denying certification, and of the Superior Court of New Jersey, Appellate Division, affirming petitioner's conviction.

COUNTER-STATEMENT OF THE CASE

The testimony as to the events of September 1, 1986, established that petitioner purposely prevented Officer Brown from effecting a lawful arrest in violation of N.J.S.A. 2C:29-2.

At approximately 12:10 a.m., on September 1, 1986, Susan Kenna was being picked up at Newark Airport by her father, John Kenna, her mother, Dorothy Kenna, her two sisters, petitioner Elaine Kenna, and Leslie Kenna and petitioner's boyfriend, Michael Gallagher. As the family was about to leave the airport in their car, a woman named Barbara Smith started screaming at Susan Kenna because the Kenna's car was double parked next to Ms. Smith's car. At that point, Mr. Gallagher began to exchange words with Ms. Smith. Ms. Smith then called the police on her cellular telephone,

claiming she had been assaulted.

Soon after, Officer Peter Schillizzie of the Port Authority Police of New York and New Jersey, arrived at the scene. Officer Schillizzie asked Mr. Gallagher to get out of the car and tell him what happened, and to provide some identification. While speaking to Officer Schillizzie, Mr. Gallagher turned and grabbed Mr. Keprios, who was among the crowd of bystanders observing the incident. Observing this, Officer Schillizzie radioed in for backup, grabbed Mr. Gallagher, and informed him that he was under arrest. The two men went down to the ground as Officer Schillizzie attempted to handcuff Mr. Gallagher. While struggling with Mr. Gallagher, Officer Schillizzie was struck by petitioner. In particular, Officer Schillizzie saw petitioner grab him from

behind and strike the left side of his head. At that point, radio cars responded to the area, and Officer Douglas Brown came to Officer Schillizzie's aid, pulling petitioner off of Officer Schillizzie. As a result of petitioner's physical assault, Officer Schillizie sustained injuries to his ear and knee.

As Officer Brown pulled petitioner off of Officer Schillizzie, petitioner appeared to be enraged. Officer Brown proceeded to inform petitioner that she was under arrest. He then attempted to handcuff petitioner but petitioner continued to struggle, resisting efforts by Officer Brown to complete the arrest. It was only after the handcuffs were on her wrists that petitioner stopped her resistance. Officer Brown indicated on direct examination that he saw only petitioner on top of Officer Schillizzie.

He then identified petitioner in court.

On November 16 and 17, 1987, a trial was conducted before the Honorable Anthony J. Frasca, J.M.C. At the conclusion thereof, the municipal court found that petitioner was not guilty of Officer Schillizzie's charge of resisting arrest. The court also found that while petitioner was not guilty of assault against Officer Brown, petitioner was guilty of resisting arrest as to Officer Brown. Specifically, the court found that petitioner was "thrashing about" and "flailing her arms". It also found that petitioner's contact with Officer Brown constituted "touching and [im]permissive illegal contact." The court imposed a fine as to Count One of $250, $20 court costs, and $30 Violent Crimes penalty,

totalling $300.[1]

---

1 Respondent notes that Petitioner was initially arraigned before the Honorable Julio M. Fuentes, J.M.C., on September 3, 1986, where she pled not guilty to all charges. Petitioner subsequently appeared before Judge Fuentes on December 15, 1986, at which time she entered a retraxit plea of guilty to preventing a law enforcement officer from effecting a lawful arrest, and the second similar charge was merged therein. It was thereby agreed to drop the assault charge. On March 20, 1987, petitioner's motion to withdraw the guilty plea was granted by the Honorable Paul R. Daniele, J.M.C., and upon the conclusion of a trial conducted that day, petitioner was found guilty of interfering with Officer Schillizzie when he was attempting to arrest Mr. Gallagher. She was also found guilty of assaulting Officer Brown by hitting him, and guilty of interfering with the arrest by Officer Brown. These two latter charges were merged. Petitioner appealed the decision to the Superior Court, Law Division, on April 7, 1987 and a hearing date of April 7, 1987 was scheduled. That hearing never took place in as much as Petitioner received notice from the court that the transcript of the trial was unintelligible, and the case was being reversed and remanded to the municipal court for a new trial.

A petition for removal of the action to the Federal District Court was filed by Petitioner, and a hearing trial on that petition was held in the Federal District Court in Camden, New Jersey, before the Honorable Stanley S. Brotman U.S.D.J., on October 15, 1987. The petition was denied for lack of jurisdiction, and an appeal taken to the Third Circuit was to have been submitted to a panel to decide if the petition should be listed for possible summary action on the basis that Judge Brotman's decision was not a final order. Petitioner argued successfully and prevailed on that point, but later was not successful in her prayer that the briefing process go forward. The court ruled against Petitioner and no appeal was taken. The time in which such an appeal need be filed has now lapsed.

An appeal taken to the Superior Court of New Jersey, Law Division, was

heard by the Honorable Frances M. Cocchia, J.S.C., on June 22, 1988, and the court upheld the judgment of the Municipal Court in a decision rendered that day. The court noted that the municipal court judge had an opportunity to observe the witnesses, assess their credibility and make his findings. The court further added that it was a question of credibility, and there was sufficient testimony from Officer Brown to substantiate the charge. The court acknowledged as to credibility, that it must give due deference to the judge below who observed the witnesses, and it was not inconceivable that Officer Brown's testimony was accurate. Moreover, from her own testimony, the court indicated, there's no question petitioner knew she was under arrest. Thé Superior Court then found petitioner guilty of resisting

arrest.

On August 8, 1988, Petitioner filed a Notice of Appeal to the Superior Court, Appellate Division. In rejecting the numerous claims made by petitioner on appeal, the court stated that it found petitioner's claim to be without merit. Specifically, the court stated its recognition that its scope of review was different from that of the Law Division, which had to decide the case de novo, State v. Johnson, 42 N.J. 146, 160-163 (1964). The court stated that the Law Division judge clearly recognized her responsibility under Johnson to make a de novo determination as to petitioner's guilt or innocence, and that the judge reached independent conclusions based on t e resolution of a credibility dispute. The court further noted that although the judge resolved the issue of credibility

by giving deference to the relevant views of the municipal court judge who initially tried the case, id. at 161, she nevertheless pointed to specific factors and testimony, independent of what the prosecutor suggested was contained in the record, to support her conclusions. Lastly, the Appellate Division expressed its satisfaction that the essence of the testimony was clear and sufficient to support petitioner's conviction, despite the "substantial number of 'indiscernible' omissions" in the transcript of the proceedings in the Newark Municipal Court. (Petitioner's Exhibit A-1.) Petitioner's Petition for Certification before the New Jersey Supreme Court was summarily denied on May 2, 1989 (Petitioner's Exhibit A-2), and her Petition for a Writ of Certiorari was docketed in this Court on August 1, 1989.

In this Court, petitioner incorrectly invokes the jurisdiction of this Court under 28 U.S.C. sec. 2254, the habeas corpus provision of the statute.

REASONS FOR DENYING THE WRIT

1. THE DECISION BY THE COURTS OF NEW JERSEY TURNED ON THE SPECIFIC FACTS OF THIS CASE AND IS DEVOID OF SUBSTANTIAL PRECEDENTIAL AUTHORITY.

The questions presented by the petitioner herein is devoid of the type of precedential significance which would suggest the propriety of a writ of certiorari. In reaching their determinations, the New Jersey courts did not decide a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals. Nor did the New Jersey courts decide an important question of federal law which has not been, but should be, settled by this court; or decided a federal question in a way in conflict with applicable decisions of this Court. Rather, the State courts' opinion, which is not published, applied the appropriate state caselaw and found that under the

facts herein, a violation of the resisting arrest statute had occurred. Specifically, the trial court's determination that petitioner's acts of "thrashing about" and "flailing her arms" constituted "touching and [im]permissive illegal contact", was more than substantiated by the record.

It is apparent that the decisions rendered by the state courts were fact-sensitive determinations devoid of precedential value. Hence, the petition does not present the kind of question of public importance which merits the granting of a writ of certiorari.

2. THE DECISION BY THE NEW JERSEY COURTS WAS CORRECT.

It is well established that the applicable standard for determining evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). This standard "gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw inferences from basic facts to ultimate facts." Id. at 319; Haymon v. Higgins, 846 F.2d 1145, 1146 (8th Cir. 1988). See also State v. Martinez, 97 N.J. 567, 571-572 (1984); State v. Mayberry, 52 N.J. 413, 436-437 (1968), cert. denied 393 U.S. 1043 (1969); State v. Martin, 213 N.J. Super. 426, 434 (App.

Div. 1986). Additionally, a court of appeals cannot second-guess a trial court's findings that depend on explicit or implicit credibility findings unless those findings are unsupported by the record, United States v. Gomez, 846 F.2d 557, 560-561 (9th Cir. 1988), and it is not the function of a reviewing federal court to reweigh evidence or determine issues of credibility. Haymon v. Higgins, 846 F.2d at 1146. Accord Wainwright v Sykes, 433 U.S. 72, 81 (1977) (a state decision resting on adequate foundation of state substantive law is immune from review in the federal courts).

In the case sub judice, petitioner was convicted of resisting arrest pursuant to N.J.S.A. 2C:29-2. That statute provides in pertinent part that "[a] person is guilty of a disorderly

persons offense if he purposely prevents a law enforcement officer from effecting a lawful arrest." The testimony adduced on behalf of the State of New Jersey amply demonstrates that petitioner is indeed guilty of the charge. Officer Douglas Brown specifically described how, upon arriving at the scene, he observed petitioner choking Officer Schillizzie, while Officer Schillizzie was in the process of putting handcuffs on Mr. Gallagher. Officer Brown then apparently pulled petitioner off Officer Schillizzie, at which time petitioner became "enraged". The Officer informed petitioner that she was under arrest and attempted to handcuff her, at which point petitioner continued her struggles and efforts at resistance. Petitioner ceased resisting only <u>after</u> the handcuffs were on her hands. The municipal court judge,

who had the opportunity to observe the witnesses' demeanor clearly found the testimony of the State's witnesses to be more credible than the testimony adduced on petitioner's behalf, and the judge properly ruled that petitioner's actions constituted a violation of the state statute. See Hartford Acc. Indem. Co. v. Sullivan, 846, F.2d 377, 384 (7th Cir. 1988) (mixed question of fact and law, such as whether facts add up to offense are questions of fact governed by the clearly erroneous rule on review); United States v. Caldwell, 820 F.2d 1395, 1401 n.5 (5th Cir. 1987) (when a district court's finding is based in part on its assessment of the credibility of witnesses, only in exceptional circumstances will a court of appeals depart from such assessment). The Superior Court, Law Division, and the

Superior Court, Appellate Division, also concurred in the trial court's findings, and the state courts decision is entitled to deference by this Court. Jackson v. Virginia, 443 U.S. at 323; Thomerson v. Lockhart, 835 F.2d 1257, 1259 (8th Cir. 1987); United States v. Randle, 815 F.2d 505 (8th Cir. 1987). Moreover, as noted by the Superior Court, Appellate Division, the unintelligible portions of the trial transcripts did not detract from the overall meaning of the testimony, and the State asserts that a careful perusal of the record below supports this conclusion.

In essence, the exclusive functions reserved for the trier of fact include (i) observation of the appearances and demeanor of the witnesses; (ii) appraisal of their credibility; (iii) determinations of the weight to be given

their testimony and drawing admissible inferences therefrom; and (iv) resolution of any conflicts in evidence and the reaching of ultimate conclusion of facts. United States v. Leach, 749 F.2d 592, 600 (10th Cir. 1984). Here, the State courts' decision rested on an adequate foundation of state substantive law and is thus immune from review in the federal courts. Wainwright v. Sykes, 433 U.S. at 81.

The State further submits that the remaining questions presented by petitioner on appeal are also meritless. First, with respect to petitioner's claim that the Superior Court, Appellate Division, was required to take judicial notice of petitioner's actions before the United States District Court for the District of New Jersey, as well as to notice the appeal of that decision to the

United States Courts of Appeals for the Third Circuit, the State notes that petitioner clearly abandoned her jurisdictional claim in the lower federal courts, and as such, is now procedurally barred from raising that claim in this Court. Moreover, the Superior Court, Appellate Division, was presented with the entire record of this case, and is presumed to have knowledge that petitioner did take her claim to the federal courts. The New Jersey court, despite this, still ruled that petitioner's claims were meritless, and this decision should be affirmed.

Second, with respect to petitioner's claim that her speedy trial right was violated, the State notes that prosecution in this matter commenced on Septmeber 3, 1986, when petitioner was arraigned in the municipal court. On

Decemer 15, 1986, she entered a retraxit plea of guilty to preventing a law enforcement officer from effecting a lawful arrest, and the second similar charge was merged therein. Subsequently petitioner appeared in court on March 20, 1987 to withraw the guilty plea, and a trial was conducted that same day. Petitioner filed a petition for removal of the action to the Federal District Court and a hearing was held on October 15, 1987. Petitioner subsequently abandoned her petition, and filed an appeal to the Superior Court, Law Division. On June 22, 1988, petitioner's conviction was affirmed by the Law Division, and the Superior Court, Appellate Division, also affirmed the conviction in an unreported opinion filed on February 15, 1989. Her petition for certification was denied by the New

Jersey Supreme Court on May 2, 1989. The foregoing more than adequately refutes petitioner's claim that her right to a speedy trial was violated especially with regard to the institution of the second trial. Her arguments on this issue must therefore be rejected.

Petitioner's additional claim that she was improperly charged under N.J.S.A. 2C:29-2 with resisting the arrest of Officer Schillizzie as he attempted to arrest Mr. Gallagher is specious. This claim was dismissed by the trial court, which stated that petitioner was charged under the incorrect statutory provision. In light of this, petitioner's claim that the statute is vague is meritless, since, as the state court noted, petitioner's actions constituted obstructing the administration of law or hindering apprehension, offenses which are codified

in N.J.S.A. 2C:29-1 and N.J.S.A. 2C:29-3, and for which petitioner was not charged.

Lastly, petitioner's claim that she was denied the right to confront her accusers is devoid of merit. Officers Schillizzie and Brown, the officers involved in this incident, were clearly present at trial and did testify. These officers were subject to cross-examination by petitioner's attorney, and it is of no consequence that the officers' supervisors, who apparently determined the charges that were brought against petitioner, did not testify. The supervising officers had no first-hand knowledge of the crimes and their testimony would only have been hearsay under state and federal rules of evidence.

CONCLUSION

For the reasons stated above, Respondent, the State of New Jersey, respectfully requests that this Court deny the Petition for Certiorari to the United States Court of Appeals for the Supreme Court of the State of New Jersey.

Respectfully submitted,

HERBERT H. TATE, JR.
ESSEX COUNTY PROSECUTOR

GLENN D. GOLDBERG
ASSISTANT PROSECUTOR

DATED:

NO. 89-249

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ELAINE KENNA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Supreme Court of The
State of New Jersey

PETITIONER'S REPLY BRIEF

Elaine Kenna
33-06 92nd Street
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(718) 458-9406

Clarifying Statement of Questions Presented for Review

1. Petitioner is requesting a writ of certiorari be issued, so this Court may resolve questions in regard to rights guaranteed under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, necessary as a result of failure on the part of the courts of New Jersey to address Constitutional issues brought to their attention. The State of New Jersey claims that the question presented for review, is whether this Petitioner's rights were denied by the ruling rendered in the state trial courts, that under the facts of the case, Petitioner is guilty of resisting arrest. To the contrary, the record shows that appeals were taken essentially on legal grounds. The central question in the case is in regard to the sufficiency of evidence and that issue is a question of law and not of fact.

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PETITIONER'S REPLY BRIEF

The Petitioner, Elaine Kenna, respectfully requests that this Court grant the petition for a writ of certiorari, to review the judgment of the Supreme Court of New Jersey, denying certification, and of the Superior Court of New Jersey, Appellate Division, affirming petitioner's conviction of an attempt to cause bodily injury to P.O. Douglas Brown by punching him in violation of New Jersey Statute 2C:12-1(a)(1), and purposely prevent a law enforcement officer, P.O. Douglas Brown, from effecting a lawful arrest, in violation of New Jersey Statute 2C:29-2, the former charge being merged into the latter.

CLARIFYING STATEMENT OF THE CASE

Evidence deemed to be sufficient to support a conviction of two charges brought by the State of New Jersey was comprised solely of testimony of Officer Brown, which testimony relative to those charges is found in its entirety in the judgment of the Appellate Division, as corrected by the Petitioner in papers before this Court, and testimony of Officer Schillizzie, which the Appellate Division has stated contains few relevant observations of defendant with respect to Brown. Petitioner, by restoring a sentence in the middle of Officer Brown's testimony that was omitted from the judgment of the Superior Court of New Jersey, Appellate Division, has shown the Constitutional dimensions of the unintelligible portions of the record. It appears that officer's handcuffs weren't discharged at the time of the arrest, and his actions immediately before his testimony that, "I told [defendant] she was under arrest" do not reveal the actions of a person witnessing a crime:

> Q What, if anything, did you observe upon your arrival?
> A (Indiscernible, microphone) my car around the corner.
> Walked through the (indiscernible) a large crowd on the curb. I'd estimate there was about 30 people. (Indiscernible) and I saw (indiscernible) my attention became focused on Officer Schillizzie on the ground attempting to put his handcuffs on a man.
> Q Who was this man?
> A (Indiscernible) Michael Gallagher.
> Q And then what happened?
> A At that point in time I also observed the defendant, Miss Kenna, (indiscernible, microphone) choking and (indiscernible).
> Q How long did you observe Miss Kenna? (R. 40)

A Well, from the time it took me to walk from west (R. 40)
(indiscernible).
Q Can you discribe (indiscernible) with her after
indiscernible)?
A I would describe her as enraged at having been
pulled from (indiscernible).
Q Well, what (indiscernible, microphone)? Did you
see Miss Kenna strike Officer Schillizzie?
A Strike -- no. I saw the choking.
Q Then what happened?
A I had to put the (indiscernible). At that point I
walked back towards the officer to make sure he
was in control of the situation. And as I said, I had
my weapon (indiscernible).
Q Did you say anything to the defendant?
A Not (indiscernible)
Q Would you discribe the strike?
A (Indiscernible, chair squeaking, not near microphone.)
Q Then what happened?
A At that time — at that time I told her she was under
arrest
(Continues in judgment of Appellate Division)

In regard to Officer Schillizzie's testimony in support of a charge identical to that of Officer Brown that Petitioner purposely prevent a law enforcement officer from effecting a lawful arrest, the record shows that Schillizzie, not Kepreos was the bystander. Kepreos had come out of the crowd and pushed the defendant, (R. 79) causing her to call for help. Her call was heard by everyone who (R. 59 testified at the trial except for Officer Brown, who had not yet arrived at the scene, and Officer Schillizzie who was unable to recall her call for aid. He also testified that the Petitioner had (R. 28) struck him just once, and that was at a time he was concentrating (R. 21)

on Gallagher, while several people were hitting him on the back; (R. 31) he saw the defendent on his left, next to him, on the same level as (R. 34) he was, when looking up, as he was checking his revolver. How (R. 36) the Petitioner had grabbed him from behind is not in his testimony, but it is on the record that the Petitioner's sister was pulled by Brown. Also in evidence is corroborated testimony that Officer Schillizzie had never informed Gallagher that he was under arrest. (R. 63) In any event, the resolution of issues in regard to the testimony of Officer Schillizzie is found in the findings of the Appellate Division, (Petition A-1, 12) wherein that tribunal expressed disbelief that Judge Cochia's reference to defendant being on top of Schillizzie is controlling, except, perhaps, as to Brown's decision to arrest her. The Municipal Court judge had found there to be no punching out at Officer Brown., but found the Petitioner had been flailing and thrashing, with no testimony in regard to either flailing or thrashing. His finding was that the Petitioner would probably have been found guilty of N.J.S.A. 2C:29-1, although such a guilty verdict requires a commission of an act that is unlawful in and of itself.

Thrashing and flailing are not such acts.

The relevance of the inclusion in the instant proceeding of charges to which the Petitioner has been found not guilty, including statements to the effect that the Petitioner caused injuries to

Officer Schillizzie's ear and knee, as well as statements that the defendant was found guilty of assault at the first trial only points up the need for the writ or certiorari to issue. Testimony in the Newark Municipal Court in regard to injuries is as follows:

Schillizzie: Direct

Q Did you — Did you sustain injuries?

A I was transported to the hospital. I had knee injuries and an injury to my left ear.

Schillizzie: Cross

Q And even though you were injured and all that, you just didn't file any charges?

A No, I did not.

Q Even though going to the hospital — by the way do you have any medical records concerning that injury and that visitation concerning going to the hospital?

A Yes, I do.

Mr. Ford: I object. As to the relevancy.

The Court: Well, you opened up the door because I haven't seen the relevancy either. It would seem to me that the injury that would have been sustained, I imagine, although I don't know this, were probably a result of the incident involving Mr. Gallagher. R. 23:

In regard to the guilty verdict that was rendered after the first trial that was declared a mistrial, and for which there is no recorded testimony of Officer Brown, that record was discussed by counsel at the second trial:

The Court: I just want to see, frankly, if it's appropriate for us to start ab initio or if the matter should be better handled by the same Judge that handled it last time. I don't know if that issue's been resolved.

Mr. Oliveras: Your Honor, I would have certain objections to that because — R. 7

> The Court: To what?
> Mr. Oliveras: To — to having the same Judge handle the same case. For one reason, your Honor, there may be —objections to be brought which should have been brought then. And at the same time there were — there were circumstances that I would not be — that I would say there were errors made by the — by the Judge at that time. R. 7

Petitioner finds the cases cited by the State of New Jersey to be only supportive of her claim as she pursues her rights to seek a writ of certiorari under authority of the Constitution of the United States, and provisions of Title 28, sec. 2254. The Petitioner is not in custody, and does not seek a writ of habeas corpus. Rather, evidence suggests that the judgment of the Superior Court of New Jersey, Appellate Division, for which the Supreme Court of New Jersey has denied certification, is not correct, and should not be permitted to stand.

There is no precedent in the the cases cited by the State of New Jersey that applies to the facts of the current case. In State v. Johnson, (42 N.J. 146 (1961) the State had presented creditable evidence in the form of testimony that established facts such as a low rate of speed of the vehicle, as well as scientific evidence as to the consumption of alcoholic beverages. Deference had to be given to these trial court findings upon trial de novo, and credibility rested on a basis where the judge's opportunity to observe the demeanor of the witnesses had a bearing due to the nature, clarity and testimony supported by evidence.

In regard to the matter of United States v. Caldwell, 820 F.2d 1395 (5th Cir. 1987), as that case established that a reviewing court can in exceptional circumstances depart from a trial court's finding made on the basis of that trial court's determination in regard to the credibility of witnessess, facts establish circumstances as stated.

United States v. Gomez, 846 F.2d 557 (9th Cir. 1988), concerns restriction of cross examination during a pretrial suppression hearing on a specific matter, in which second guessing the trial court has substantially less basis than in this case.

Precedents set in the other cases cited by the State of New Jersey can similarly be dismissed as simply being inappropriate.

PETITIONER'S REPLY TO LEGAL QUESTIONS RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

The precedential value and importance of the case has been made clear in papers before the Court. Unclear and in need of briefing is the position of the State of New Jersey in regard to the rights of a person charged with a crime to make a retraxit plea, and the relationship of that plea to a speedy trial. Similar questions have arisen in regard to the Petitioner's attempt to remove the cause to a Federal Court. Throughout, the exercise of those privileges, the State of New Jersey was in control of, and did exercise their right to continue process and summon the Petitioner into the New Jersey courts. The second trial was scheduled before the Petitioner brought the matter to the United States District Court on October 16, 1988, and the trial in Newark Municipal Court was maintained for October 19, 1988, at which time both sides appeared.

Petitioner's point in regard to the right to confront her accusers is well taken considering the record below in which the complaining witness came into Newark Municipal Court more than a year after she had been charged with assault, and that complaining witness was not even questioned in regard to such an assault. The other complaining witness forgot facts material to the case. The incident had started at Newark Airport with two police officers ignoring the Petitioners call for help, at which time one of the

officers left the area after Officer Schillizzie had at that point (R. 81) attempted to arrest Gallagher who had gone to Petitioner's aid.

The Petition to this Court is for relief from the final decision of a state court, and in no way is a petition for removal of a prosecution before trial, which has been abandoned as counsel has stated.

CONCLUSION

For the reasons stated above, Petitioner, Elaine Kenna, respectfully prays this Court will issue a Writ of Certiorari to the United States Court of Appeals for the Supreme Court of the State of New Jersey.

Respectfully submitted,

_____

Elaine Kenna

DATED: